IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4223 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HARIT ISHWARBHAI ANDHARIYA

Versus

STATE OF GUJARAT

Appearance:

MR AD SHAH for Petitioners

MR BY MANKAD, APP for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 23/09/1999

ORAL JUDGEMENT

Heard learned counsel Mr. A.D.Shah for the petitioners and Mr. BY Mankad, learned APP for the respondent State.

The petitioners are the original accused nos. 1 & 2 facing criminal trial before the Sessions Court,

Bhavnagar. According to the case of the prosecution, the petitioners have committed an offence punishable under section 302 R/w 114 of the I.P.Code and under Sec.3(1)(10) of Scheduled Caste & Schedule Tribes (Prevention of Atrocities) Act (hereinafter referred to as the "Atrocities Act"). The case of the prosecution against the petitioner is that on 9.8.1998 between 10.00 P.M. to 11.30 A.M. , accused persons applied force on the body of the deceased Jivabhai and because of the force, Jivabhai had fallen down and sustained head injury. Wife of Jivabhai was informed about the incident and Jivabhai was taken at his residence and in the next morning, because of the serious physical condition, a doctor was called at the residence and as per his advise, in the morning of 10.8.1998, Jivabhai was removed to the Government Hospital and was admitted in Emergency Ward. At that time, deceased was unconscious. No statement of deceased Jivabhai was recorded. It is the case of the prosecution that, husband of the complainant Champaben was not doing any work. He was aged about 66 years and was in the habit of consuming liquor in the company of his friends near Chabutara at Vadawa Padar Devki of Bhavnagar town. On the day of incident, husband of the complaint had gone to said place where there is a rickshaw stand and had consumed liquor. At about 10.00 P.M., there was exchange of words between the deceased and his companion with both these petitioners and during hot exchange of words, some force was applied and deceased had fallen down.

As the deceased Jivabhai succumbed to head injury sustained at the time of incident, both the petitioners were arrested by the police and are facing trial as stated above. I am told that the case against the present petitioners is registered as Special Case No. 45/98 and Special Judge, Bhavnagar has framed charges against the petitioners accused in the month of April 1999. So, it can be said that the charge is framed for the aforesaid offences pending hearing and final of disposal of this application.

It is submitted by the learned counsel Mr. AD Shah appearing for the petitioners that ingredients of the offences punishable under sec.302 of the I.P.Code as well as under sec. 3(1)(10) of the Atrocities Act are clearly missing on record. At the instance of learned counsel Mr. Shah, papers of investigation including viscera report were called for and are brought before this Court today. I have gone through the same. I am told by ld. APP Mr. Mankad that the presence of Methyl Alcohol was found and percentage is very heavy i.e. more than 57% according to Post Mortem Notes. Therefore, submissions advanced by learned counsel Mr. Shah, in

light of the decision of the Apex Court in the case of Jani Gulab Shaikh v/s State of Maharashtra, 1970 SCC (Cri.) 532, require forceful consideration. Mr. Shah has taken this Court through the entire judgment of the Apex Court. The facts of the case before the Apex Court are practically identical to the facts of the case on hand. In the case before the Apex Court, deceased was given a push and as the deceased was under the influence of alcohol, had fallen down on cemented road and sustained injuries on the head. That fall resulted into fracture of occipital bone (skull) and victim died on the spot. While dealing with the case the Apex Court, in para-3, observed as under :-

" The relevant facts as found by the High Court and as appearing on the record are as follows: At about 4.30 p.m. on August 11,1965, the deceased, Shankar, was passing by the station road accompanied by Mohan Gujarathi, P.W.2. When they came near the shop of the appellant- hereinafter referred to as the accused- which is at a distance of about 20 feet from the Station Road, the deceased uttered "Koun Hai Bonduk Panduk Kiski Aawaj Hai Aa Jao". Hearing this the appellant came out of the shop and warned the deceased not to give abuses and asked him to go ahead. Inspite of this, the deceased seems to have continued abusing the accused. Three eye witnesses were produced by the prosecution. The High Court found as follows:

" In spite of some minor contradictions and minor discrepancies, it is clear from the evidence of these three eye-witnesses that the deceased and Mohan Gujarathi were passing by the Station Road and when they came near the shop of the accused the deceased started abusing the accused. It also appears that the deceased was under the influence of liquor, it is also clear from this consistent evidence that though the deceased was asked by the accused to go ahead, the deceased still stood firm and continued abusing the accused. It is also clear that the accused then came from his shop and gave blows to the deceased and the deceased fell down with the face towards the sky and immediate result noticed by the witnesses was that the deceased became unconscious and his

mouth and ear started bleeding."

The Apex Court, after appreciating the evidence and considering the fact that the deceased was in drunken condition, had paused a question whether the accused is guilty under section 304 Part;II, Section 325 or Section 323, IPC. According to the Apex Court, High Court of Bombay had committed an error in holding that the accused was guilty of the offence punishable under sec. 304 Part:II of the I.P.Code. After appreciating observations made by the Bombay High Court, the Apex Court has observed in para-6 as under:-

" We are of the opinion that the accused must be deemed to know that as a result of such forcible push death could have been the likely result. The accused must be deemed to know that the deceased was likely to fall on the cement concrete road and that the force which he was actually using was likely to result in fatal injuries to the deceased. Therefore, though the accused did not intend to cause the death of the deceased and did not intend to cause him injuries sufficient in the ordinary course of nature to cause his death and did not intend to cause him injuries which were likely to cause death, at any rate, he must be posted with the knowledge that death was likely to result in the circumstances in which the injuries were caused by him to deceased.

In the case before the Apex Court, undisputedly, the deceased sustained fracture of skull which can be termed as grievous hurt. On the other hand, in the case before us, the deceased had not sustained any fracture injury. Post Mortem Notes disclose no skull fracture. There were two haematoma found and atleast one of them could have been developed during the night hours when he was lying on the earth in injured condition. It seems that because of the drunken condition, his family members had opted not to take him to the hospital. Viscera report indicates that the deceased must have consumed liquor in huge quantity. The material found from the stomach and examination of lever and blood indicates that the force at the time of falling on the ground must be because of the drunken condition. This is not the case wherein it can be even inferred that the accused or any of them must have tried to "inflict" grievous hurt. To sustain grievous injury is something different than to inflict grievous injury. Here in this case, knowledge also could not be attributed to the accused so far as their intention to cause grievous injury is concerned.

On the contrary, it can be said that one should legitimately try to see that such persons behave in proper manner atleast in the immediate vicinity of his residence or business premises and it is the duty of a responsible citizen to remove such types of nuisance by using proper wisdom and if required, by using reasonable force. In these set of facts, it would not be proper to ask anybody and petitioners in the present case to face trial for the serious offences under which punishment provided is capital punishment. At the most, petitioner accused can be tried for the offence punishable under sec.323 of the I.P.Code. However, I would like to observe that at the time of framing of charge or trying the case against the petitioners accused, prosecution can still convince the court if it can by cogent evidence that the accused should be charged and tried for the offence punishable under sec.325 of the I.P.Code.

Learned counsel Mr. Shah has submitted that so far as charge under sec.3(1)(10) of the Atrocities Act is concerned, even if the case of the prosecution is taken as it is, it would not be legal and proper to infer that the alleged pull or push was given on the count that the victim was a member of SC/ST community. When, investigating agency itself thought it fit not to apply sec.3(2)(v) of the Atrocities Act, then under same set of facts charges under sec.3(1)(x) of the Atrocities Act ought not to have been applied and framed against the petitioners accused. This is not a case of insult of the victim within the meaning of sec.3(1)(x) of the Atrocities Act. Sec.3(1)(x) of the Atrocities Act reads as under:-

"3. Punishment for offences of atrocities.(1) Whosoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-

(i) to (ix) xxxx xxxx xxxx xxxx

(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view; "

Language of the section is self-explanatory and there is no iota of evidence on record under which it can be said that these provisions are attracted.

Learned counsel Mr. Shah has placed reliance on the decision of the Division Bench of this Court (Coram: N.J. Pandya & H.L.Gokhale,JJ) in the case of Lalubha Kesharisinh Garasia v/s State of Gujarat, reported in 1997 (3) GLR 2568, has observed that it is the duty of

the prosecution to prove or establish that the offence is committed on the ground that the person is a member of Scheduled Caste or Scheduled Tribes. After referring to Sec.3(2)(v) of the Atrocities Act, the Division Bench has observed in para-12 as under:-

"12. Provisions of section quoted above clearly indicate that the offence under I.P.C. should be established by the prosecution to have been committed on the ground that the injured person or persons against whom the offence is committed is/are a member of Scheduled Caste or Scheduled Tribe. It is not sufficient that the injured person should be a member of either but further it is required to be proved that the offence has been committed on the ground of victim being a member of Scheduled Caste or Scheduled Tribe. In absence of this material, merely because the injured happens to be Scheduled Caste or Scheduled Tribe automatically the offence under sec. 3(2)(v) of the Atrocities Act is not made out. There is no material on record indicating that the deed was done on the ground that the injured was a member of Scheduled Caste. The fact that they are members of Scheduled Caste is not in dispute. However, in absence of the material that the offence has been committed on the ground of the victim being a member of Scheduled Caste, the conviction under the said provisions of the Act cannot be sustained. The appeal is, therefore,partly allowed to that extent."

The same ratio can be applied to the facts of the present case and, therefore, charge framed under sec.3(1)(x) of the Atrocities Act also requires to be quashed and set aside in absence of any satisfactory and/or prima facie evidence.

For the reasons aforesaid, this Cri.Misc. Application is partly allowed. The charges under sec.302 of the I.P.Code and under sec. 3(1)(x) o
Act framed against the petitioners accused are hereby quashed and set aside. Charge under sec.323 of the I.P.Code shall be framed against the petitioners accused. However, as observed earlier, it would be open to the prosecution to convince the Court to frame charge under sec.325 of I.P.Code by leading cogent and convincing evidence to that effect. Consequently, the learned Special Judge presently dealing with the matter is directed to send the matter before the appropriate court for trial and for expeditious disposal of it.

Rule is made absolute to the above extent.

23.09.1999 [C.K. BUCH, J]
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